

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON**

**OHIO VALLEY ENVIRONMENTAL
COALITION, INC., WEST VIRGINIA
HIGHLANDS CONSERVANCY, INC.,
COAL RIVER MOUNTAIN WATCH,
INC., and SIERRA CLUB**

Plaintiffs,

v.

CIVIL ACTION NO. 3:10-cv-833

**COAL-MAC, INC., and MINGO LOGAN
COAL COMPANY,**

Defendants.

DECLARATION OF DEREK O. TEANEY

Derek O. Teaney affirms and states as follows:

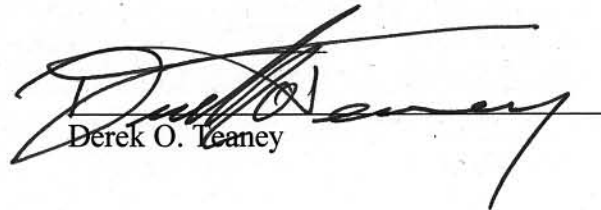
1. I am one of the attorneys for Plaintiffs in this action.
2. I obtained the discharge monitoring reports for WV/NPDES Permit

WV1003763 that are attached to this Declaration as Appendix A through public records requests under the West Virginia Freedom of Information Act from the West Virginia Department of Environmental Protection ("WVDEP") on various dates in 2010.

3. On April 14, 2010, and as required by 33 U.S.C. § 1365 and 30 U.S.C. § 1270, I sent the notice-of-intent-to-sue letter ("NOI") attached to this Declaration as Appendix B on behalf of Plaintiffs by certified mail, return receipt requested, to Gary Bennett, President of Coal-Mac, Inc.; Secretary Randy Huffman, WVDEP; Shawn Garvin, Regional Administrator of EPA Region III; Lisa P. Jackson, Administrator of EPA; Ken Salazar, Secretary of the United States Department of Interior; Joseph Pizarchik, Director of the Office of Surface Mining Reclamation and Enforcement; and CT Corporation System, Registered Agent for Coal-Mac, Inc.

The NOI was also sent to the Regional Director for the Appalachian Region of the Office of Surface Mining Enforcement and Reclamation via first class mail, postage prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Signed this 21st day of June, 2010.



Derek O. Teaney

DISCHARGE MONITORING REPORT

Covering the period from January 31, 2008 to January 1, 2010. and Sampler = "Lab"
(2)Permit ID = "WV1003763" and (3)Chemical ID = "00981".

Responsible Party	Permit Id	Insp. Unit	Chemical EPA	Report Date	DMR Type	Quantity			Concentration				
						Min.	Avg.	Max.	Unit	Min.	Avg.	Max.	Unit
Coal-Mac, Inc. Dba Phoe WV1003763	002	002	00981 - Selenium, Total Recover	12/31/2008	Normal	8.94	9.01	9.085	UG/L	8.94	9.01	9.085	UG/L
				01/31/2009	Normal	8.42	9.41	10.39	UG/L	8.42	9.41	10.39	UG/L
				02/28/2009	Normal	2.19	3.81	5.43	UG/L	2.19	3.81	5.43	UG/L
				03/31/2009	Normal	1.90	5.53	9.16	UG/L	1.90	5.53	9.16	UG/L
				04/30/2009	Normal	10.38	11.635	12.89	UG/L	10.38	11.635	12.89	UG/L
				05/31/2009	Normal	7.10	8.18	9.26	UG/L	7.10	8.18	9.26	UG/L
				06/30/2009	Normal	7.43	7.985	8.54	UG/L	7.43	7.985	8.54	UG/L
				07/31/2009	Normal	4.75	5.46	6.17	UG/L	4.75	5.46	6.17	UG/L
				08/31/2009	Normal	6.72	6.935	7.15	UG/L	6.72	6.935	7.15	UG/L
				09/30/2009	Normal	6.32	7.13	7.94	UG/L	6.32	7.13	7.94	UG/L
				11/30/2009	Normal	6.86	6.965	7.07	UG/L	6.86	6.965	7.07	UG/L
				12/31/2009	Normal	7.69	8.335	8.98	UG/L	7.69	8.335	8.98	UG/L

WVDEP - Office of Hydrologic Protection Unit (OMR)**DISCHARGE MONITORING REPORT**

Covering the period from January 31, 2010 to April 1, 2010. and Sampler = "Lab"
(2)Permit ID = "WV1003763"

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Responsible Party	Permit Id	Insp. Unit	Chemical EPA	Report Date	DMR Type	Quantity			Concentration		
						Min.	Avg.	Max.	Min.	Avg.	Max.
Coal-Mac, Inc. Dba Phoe WV1003763		002	00058 - Flow	01/31/2010	Normal	25.00	27.50	30.00			
				02/28/2010	Normal	25.00	25.00	25.00			
				03/31/2010	Normal	30.00	36.50	43.00			
Coal-Mac, Inc. Dba Phoe WV1003763		002	00400 - pH	01/31/2010	Normal						
				02/28/2010	Normal						
				03/31/2010	Normal						
Coal-Mac, Inc. Dba Phoe WV1003763		002	00530 - Total Suspended Solids	01/31/2010	Normal						
				02/28/2010	Normal						
				03/31/2010	Normal						
Coal-Mac, Inc. Dba Phoe WV1003763		002	00981 - Selenium, Total Recover	01/31/2010	Normal						
				02/28/2010	Normal						
				03/31/2010	Normal						
Coal-Mac, Inc. Dba Phoe WV1003763		002	01045 - Iron, Total (as Fe)	01/31/2010	Normal						
				02/28/2010	Normal						
				03/31/2010	Normal						
Coal-Mac, Inc. Dba Phoe WV1003763		002	01055 - Manganese, Total (as Mn)	01/31/2010	Normal						
				02/28/2010	Normal						
				03/31/2010	Normal						
Coal-Mac, Inc. Dba Phoe WV1003763		002	01105 - Aluminum, Total (as Al)	01/31/2010	Normal						
				02/28/2010	Normal						
				03/31/2010	Normal						
Coal-Mac, Inc. Dba Phoe WV1003763		002	01106 - Aluminum, Diss. (as Al)	01/31/2010	Normal						
				02/28/2010	Normal						
				03/31/2010	Normal						
Coal-Mac, Inc. Dba Phoe WV1003763		003		01/31/2010	Normal						
				02/28/2010	No Flow						
				03/31/2010	No Flow						
Coal-Mac, Inc. Dba Phoe WV1003763		DLF	00061 - Stream Flow cfs	01/31/2010	Normal	3.00	3.15	3.30			
				02/28/2010	Normal	2.70	2.85	3.00			
				03/31/2010	Normal	2.70	2.85	3.00			
Coal-Mac, Inc. Dba Phoe WV1003763		DLF	00400 - pH	01/31/2010	Normal						
				02/28/2010	Normal						
				03/31/2010	Normal						
Coal-Mac, Inc. Dba Phoe WV1003763		DLF	01045 - Iron, Total (as Fe)	01/31/2010	Normal						
				02/28/2010	Normal						
				03/31/2010	Normal						
Coal-Mac, Inc. Dba Phoe WV1003763		DLF		01/31/2010	Normal						
				02/28/2010	Normal						
				03/31/2010	Normal						

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APPENDIX A TO EXHIBIT 2

WVDEP - Office of Hydrologic Protection Unit (OMR)**DISCHARGE MONITORING REPORT**

Covering the period from January 31, 2010 to April 1, 2010. and Sampler = "Lab"
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Responsible Party	Permit Id	Insp. Unit	Chemical EPA	Report Date	DMR Type	Quantity			Concentration		
						Min.	Avg.	Max.	Min.	Avg.	Max.
Coal-Mac, Inc. Dba Phoe WV1003763	DLF	DLF	01045 - Iron, Total (as Fe)	02/28/2010	Normal	< 0.059	< 0.059	0.069	< 0.059	< 0.059	0.069
				03/31/2010	Normal	0.07	0.075	0.08	0.07	0.075	0.08
Coal-Mac, Inc. Dba Phoe WV1003763	DLF	DLF	01055 - Manganese, Total (as Mn)	01/31/2010	Normal	< 0.0512	< 0.0512	< 0.0512	< 0.0512	< 0.0512	< 0.0512
				02/28/2010	Normal	< 0.051	< 0.051	< 0.051	< 0.051	< 0.051	< 0.051
Coal-Mac, Inc. Dba Phoe WV1003763	DLF	DLF	01105 - Aluminum, Total (as Al)	03/31/2010	Normal	< 0.03	< 0.03	< 0.03	< 0.03	< 0.03	< 0.03
				01/31/2010	Normal	< 0.0289	< 0.0289	0.05042	< 0.0289	< 0.0289	0.05042
				02/28/2010	Normal	< 0.029	< 0.029	< 0.029	< 0.029	< 0.029	< 0.029
				03/31/2010	Normal	< 0.06	< 0.06	0.08	< 0.06	< 0.06	0.08

Appalachian Center
FOR THE ECONOMY & THE ENVIRONMENT

P. O. Box 507
Lewisburg, WV 24901
ph: 304-645-9006
fax: 304-645-9008
e-mail: info@appalachian-center.org
www.appalachian-center.org

April 14, 2010

Gary L. Bennett
President
Coal-Mac, Inc.
City Place One, Suite 300
Saint Louis, MO 63141

By Certified Mail – Return Receipt Requested

Re: 60-Day Notice of Intent to File Citizen Suit Under Clean Water Act Section 505(a)(1) for Violation of Terms and Conditions of West Virginia NPDES Permit WV1003763 and WV0068764 and Compliance Order No. 5; and 60-Day Notice of Intent to File Citizen Suit Under the Federal Surface Mining Control and Reclamation Act Section 520(a)(1) for Violations of Federal and State Regulations and Permit Conditions on West Virginia Surface Mining Permit Numbers S507492, S006983, S007280, S501494, S504592, U503595, O51600, S503695, and S505289

Dear Mr. Bennett:

The Sierra Club, the Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy, in accordance with section 505 of the Clean Water Act (the "Act" or the "CWA"), 33 U.S.C. § 1365, and 40 C.F.R. Part 135, hereby notify you that Coal-Mac, Inc ("Coal-Mac"), has violated, and continues to violate, "an effluent standard or limitation" under Section 505(a)(1)(A) of the Act, 33 U.S.C. § 1365(a)(1)(A), by failing to comply with the terms of West Virginia/National Pollution Discharge Elimination System ("WV/NPDES") Permits WV1003763 and WV0068764 and Compliance Order No. 5. Furthermore, Coal-Mac is in ongoing and continuing violation of section 301 of the Act, 33 U.S.C. § 1311, as a result of its discharge of selenium into West Virginia's waters in an amount in excess of the final effluent limits specified in WV/NPDES Permits WV1003763 and WV0068764 and Compliance Order No. 5. If within sixty days of the postmark of this letter Coal-Mac does not bring itself into full compliance with the Act, we intend to file a citizens' suit seeking civil penalties for Coal-Mac's ongoing and continuing violations and for an injunction compelling it to come into



compliance with the Act.

We further notify you, in accordance with section 502 of the federal Surface Mining Control and Reclamation Act (“SMCRA”), 30 U.S.C. § 1270, and 30 C.F.R. § 700.13, that Coal-Mac is in ongoing and continuing violation of certain federal and state regulations promulgated under SMCRA and the West Virginia Surface Coal Mining and Reclamation Act (“WVSCMRA” or the “State Act”) and certain permit conditions on West Virginia Surface Mining Permits S507492, S006983, S007280, S501494, S504592, U503595, O51600, and S505289 as a result of its discharge of selenium into the Left Fork of Right Fork of Trace Fork of Pigeon Creek, Laurel Fork of the Right Fork of Pine Creek, Fivemile Creek, and the Right Fork of Trace Fork of Pigeon Creek from Coal-Mac’s surface mining operations. If, within sixty days, Coal-Mac does not bring itself into full compliance with SMCRA, the regulations promulgated under SMCRA and the WVSCMRA, and Surface Mining Permits S507492, S006983, S007280, S501494, S504592, U503595, O51600, and S505289, we intend to file a citizens’ suit in federal court seeking an injunction compelling Coal-Mac to come into compliance with the applicable statutes, regulations, and permits.

I. WV/NPDES PERMIT WV1003763 AND SURFACE MINING PERMIT NUMBER S507492

A. CLEAN WATER ACT VIOLATIONS

Section 301 of the CWA prohibits the discharge of any pollutant by any person, except in compliance with a permit. WV/NPDES Permit WV1003763 allows Coal-Mac to discharge pollutants into West Virginia’s waters, including selenium. Those permits, however, set limits on the amount of selenium that Coal-Mac may discharge. Those limits are known as effluent limitations, and a violation of an effluent limit is a violation of the CWA, actionable under section 505(a)(1) of the Act.

Coal-Mac’s WV/NPDES Permit WV1003763 regulates Coal-Mac’s discharges from its Hobet No. 7 Surface Mine in Logan and Mingo Counties, West Virginia into the Left Fork of Right Fork of Trace Fork of Pigeon Creek, a water of the United States.

WV/NPDES Permit WV1003763 established an effective date for the final selenium limits on Outfall 002 regulated by that permit of December 2, 2008. The DMRs that Coal-Mac provided to WVDEP for the period reveal that during that time period, Coal-Mac accrued 345 days of violation of the final average monthly selenium effluent limitation (4.7 µg/l) and the daily maximum selenium effluent limitation (8.2µg/l). Those violations are set out in Appendix A to this notice letter. Based on those violations, and on the absence of any evidence that Coal-Mac has taken meaningful efforts to eradicate its selenium discharges from those outfalls, we believe that Coal-

Mac's violations of those limits are continuing and ongoing. We intend to sue Coal-Mac for those violations if Coal-Mac does not eliminate them within 60 days.

Each discharge amount that exceeds permit limits is an unlawful and unpermitted discharge and, therefore, is not shielded from liability under Section 402(k) of the Clean Water Act. Swartz v. Beach, 229 F. Supp. 2d 1239, 1269 (D. Wyo. 2002); U.S. E.P.A., Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits at 2, n.1 (April 11, 1995) (explaining that, in a NPDES permit, "authorization is only provided to discharge such pollutants within the limits and subject to the conditions set forth in the permit" (emphasis added)). The federal courts, when assessing civil penalties, consider a violation of an average monthly effluent limitation to be a violation of the limit for each and every day of the month that the violation occurred. See, e.g., Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 313-15 (4th Cir. 1986), vac'd on other grounds, 484 U.S. 49 (1987).

Finally, WV/NPDES Permit WV1003763 incorporates by reference the conditions on discharges set out in 47 C.S.R. § 30-5.1.f, which prohibits discharges that cause violations of applicable water quality standards. Coal-Mac's discharges of excess selenium from Outfall 002 have led to water quality standard violations in the receiving streams by violating the numeric criteria for selenium. Accordingly, we intend to include in our citizen suit claims that Coal-Mac has violated the condition of WV/NPDES Permit WV1003763 that prohibits discharges that cause violations of water quality standards.

B. SURFACE MINING VIOLATIONS

Section 502(a)(1) of SMCRA authorizes citizens to commence civil actions against any person alleged to be in violation of rules, orders, or permits issued pursuant to SMCRA. 30 U.S.C. § 1270(a)(1). We allege that Coal-Mac is in continuous and ongoing violation of the following:

- (1) 38 C.S.R. § 2-14.5, promulgated under the State Act;
- (2) 30 C.F.R. §§ 816.41(a) and 817.41(a), promulgated under SMCRA;
- (3) 30 C.F.R. §§ 816.42 and 817.42, promulgated under SMCRA; and
- (4) The permit conditions incorporated into West Virginia Surface Mining Permit S507492 by operation of 38 C.S.R. § 2-3.33.c, promulgated under the State Act.

Coal-Mac's SMCRA-related violations began on December 2, 2008, when its selenium effluent limitations became final. We believe that Coal-Mac's violations continue to the present time.

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1. BACKGROUND

In 1977, Congress enacted SMCRA in order to “assure that surface coal mining operations are so conducted as to protect the environment.” 30 U.S.C. § 1202(d). SMCRA encourages “cooperative federalism” by allowing states to adopt their own programs for the regulation of mining, so long as those programs are as stringent as the federal program. See generally 30 U.S.C. § 1253. The Secretary of the Department of the Interior, charged with implementing SMCRA, has approved West Virginia’s state mining regulation program. See 30 C.F.R. § 948.10. Consequently, West Virginia regulates mining operations in this state under article 3 of chapter 22 of the West Virginia Code and issues surface mining permits consistent with that statute.

To serve the statutory goal of environmental protection, SMCRA and the State Act impose performance standards on mining operations. Those standards are codified in 40 C.F.R. Parts 816 and 817, and 38 C.S.R. § 2-14. Coal-Mac’s violation of the performance standards will be the basis of any citizen suit under SMCRA.

Under the color of WV/NPDES Permit WV1003763, Coal-Mac discharges unlawful quantities of selenium into the Left Fork of Right Fork of Trace Fork of Pigeon Creek from its Hobet No. 7 Mine in Logan and Mingo Counties, West Virginia.

2. COAL-MAC’S MINING OPERATIONS HAVE RESULTED IN EFFLUENT LIMITATIONS AND WATER QUALITY STANDARDS VIOLATIONS

The federal performance standards under SMCRA mandate that all discharges from permitted mining operations “be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. Part 434.” 40 C.F.R. §§ 816.42 & 817.42. The regulations under the State Act prescribe a similar standard: “Discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards.” 38 C.S.R. § 2-14.5.b.

The DMRs that Coal-Mac provided to WVDEP under the Clean Water Act that document the company’s discharges under WV/NPDES Permit WV1003763 indicate that Coal-Mac began violating its effluent limits for selenium when they became final on December 2, 2008. Moreover, as described above, those discharges caused violations of applicable numeric water quality standards. As discussed above, each discharge amount that exceeds permit limits is an unlawful and unpermitted discharge and, therefore, is not shielded from liability under Section 402(k) of the Clean Water Act. Swartz v. Beach, 229 F. Supp. 2d 1239, 1269 (D. Wyo. 2002); U.S. E.P.A. Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits at 2, n.1

(April 11, 1995) (explaining that, in a NPDES permit, “authorization is only provided to discharge such pollutants within the limits and subject to the conditions set forth in the permit” (emphasis added)). Consequently, Coal-Mac is in violation of the federal and state performance standards regarding surface water discharges and is subject to a citizen suit under SMCRA.

3. COAL-MAC IS IN ONGOING AND CONTINUING VIOLATION OF THE CONDITIONS OF WEST VIRGINIA SURFACE MINING PERMITS S507492

Under the State Act, all of the performance standards set forth in the West Virginia Surface Mining Rule—including the performance standards discussed above—are incorporated as conditions in every permit issued under the act. 38 C.S.R. § 2-3.33.c. Coal-Mac’s Surface Mining Permit S507492 is associated with its unlawful discharges under WV/NPDES Permit WV1003763. By operation of 38 C.S.R. § 2-33.c, that surface mining permit incorporates the performance standards discussed in Section II.B *supra*. The upshot of that incorporation is that Coal-Mac’s unlawful discharges are subject to regulation under the terms of its surface mining permit.

As described above, Coal-Mac is violating the performance standards that prohibit violations of effluent limitations and water quality standards. See 40 C.F.R. §§ 816.41-816.42 & 817.41-817.42, 38 C.S.R. §§ 2-14.5 & 2-14.5.b. Consequently, it is simultaneously violating the conditions of Surface Mining Permit S507492 and is subject to a citizen suit under SMCRA.

II. WV/NPDES PERMIT WV0068764 AND SURFACE MINING PERMITS S006983, S007280, S501494, S504592, U503595, O51600, S503695, AND S505289

A. CLEAN WATER ACT VIOLATIONS

Section 301 of the CWA prohibits the discharge of any pollutant by any person, except in compliance with a permit. WV/NPDES Permit WV0068764 allows Coal-Mac to discharge pollutants into West Virginia’s waters, including selenium. Those permits, however, set limits on the amount of selenium that Coal-Mac may discharge. Those limits are known as effluent limitations, and a violation of an effluent limit is a violation of the CWA, actionable under section 505(a)(1) of the Act.

Moreover, the West Virginia Department of Environmental Protection (“WVDEP”) issued a compliance order to Coal-Mac that is related to WV/NPDES Permit WV0068764. Amended Compliance Order No. 5 constitutes an “order issued by the Administrator or a State with respect to [effluent] standard[s] or limitation[s]” for purposes of Section 505(a)(1) of the Clean Water Act and, hence, violations of that

compliance order are actionable in a Clean Water Act citizen suit.

Coal-Mac's WV/NPDES Permit WV0068764 regulates Coal-Mac's discharges from its mines near Island Creek in Logan and Mingo Counties, West Virginia into Laurel Fork of the Right Fork of Pine Creek, Fivemile Creek, and the Right Fork of Trace Fork of Pigeon Creek. Those streams are waters of the United States.

WV/NPDES Permit WV0068764 incorporated a schedule of compliance that delayed the effective date of the permit's final effluent limitations for selenium until January 28, 2007. On April 5, 2008, WVDEP issued Coal-Mac Amended Compliance Order No. 5, which placed additional obligations regarding selenium treatment and compliance on Coal-Mac. Among other things, Amended Order No. 5 required Coal-Mac to commence construction of selenium treatment by October 5, 2008, to complete installation of the requisite selenium treatment facilities by April 5, 2010, and to comply with its final selenium effluent limitations by April 5, 2010.

Through the schedule of compliance in WV/NPDES Permit WV0068764 and Order No. 5, WVDEP gave Coal-Mac more than six years to solve its selenium problem. Based on status reports submitted by Coal-Mac's parent company regarding its company-wide selenium efforts, and based on Coal-Mac's discharge monitoring reports ("DMRs"), it is clear that Coal-Mac has failed to use the time given it wisely.

The DMRs that Coal-Mac provided to WVDEP for the period from January 1, 2008 through December 31, 2009, reveal a pattern of selenium discharges that would have exceeded the final average monthly selenium effluent limitation (4.7 µg/l), the daily maximum selenium effluent limitation (8.2µg/l), or both, had those limits been effect at that time. Those discharges occurred at three outfalls: Outfall 001, Outfall 003, and Outfall 014. The following table identifies the receiving stream for each of those outfalls:

OUTFALL	RECEIVING STREAM
001	Laurel Fork of Right Fork of Pine Creek
003	Fivemile Creek
014	Right Fork of Trace Fork of Pigeon Creek

The discharges of excess selenium from those outfalls are set out in Appendix A to this notice letter. Based on those exceedances, and on the absence of any evidence that Coal-Mac has taken meaningful efforts to eradicate its selenium discharges from those outfalls, we believe that Coal-Mac was in violation of the selenium limits on Outfalls 001, 003, and 014 of WV/NPDES Permit WV0068764 on or about April 5, 2010, when those limits became final, and that Coal Mac will continue to violate those limits after that date. We

intend to sue Coal-Mac for those violations if Coal-Mac does not eliminate them within 60 days.

Each discharge amount that exceeds permit limits is an unlawful and unpermitted discharge and, therefore, is not shielded from liability under Section 402(k) of the Clean Water Act. Swartz v. Beach, 229 F. Supp. 2d 1239, 1269 (D. Wyo. 2002); U.S. E.P.A., Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits at 2, n.1 (April 11, 1995) (explaining that, in a NPDES permit, “authorization is only provided to discharge such pollutants within the limits and subject to the conditions set forth in the permit” (emphasis added)). The federal courts, when assessing civil penalties, consider a violation of an average monthly effluent limitation to be a violation of the limit for each and every day of the month that the violation occurred. See, e.g., Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 313-15 (4th Cir. 1986), vac’d on other grounds, 484 U.S. 49 (1987).

Furthermore, Amended Order No. 5 required Coal-Mac to “[c]ommence construction and/or installation of” selenium treatment facilities by October 5, 2008, and to “[c]omplete installation or construction of the treatment facilities, and achieve compliance with the final selenium permit effluent limitations” by April 50, 2010. Based on Coal-Mac’s DMRs, and its application to extend its selenium compliance schedule, it is clear that Coal-Mac has failed to meet those obligations. Because Coal-Mac’s failure to design and install treatment on Outfalls 001, 003, and 014 is ongoing, Coal-Mac is subject to a citizen suit for its violations of Amended Order No. 5 under Section 505(a)(1) of the Clean Water Act. We intend to bring such a suit in 60 days unless Coal-Mac comes into compliance with the requirements of Amended Order No. 5.

Finally, WV/NPDES Permit WV0068764 incorporates by reference the conditions on discharges set out in 47 C.S.R. § 30-5.1.f, which prohibits discharges that cause violations of applicable water quality standards. Coal-Mac’s discharges of excess selenium from Outfall 001, 003, and 014 have led to water quality standard violations in the receiving streams by violating the numeric criteria for selenium. Accordingly, we intend to include in our citizen suit claims that Coal-Mac has violated the condition of WV/NPDES Permit WV0068764 that prohibits discharges that cause violations of water quality standards.

B. SURFACE MINING VIOLATIONS

Section 502(a)(1) of SMCRA authorizes citizens to commence civil actions against any person alleged to be in violation of rules, orders, or permits issued pursuant to SMCRA. 30 U.S.C. § 1270(a)(1). We allege that Coal-Mac is in continuous and ongoing violation of the following:

- (1) 38 C.S.R. § 2-14.5, promulgated under the State Act;
- (2) 30 C.F.R. §§ 816.41(a) and 817.41(a), promulgated under SMCRA;
- (3) 30 C.F.R. §§ 816.42 and 817.42, promulgated under SMCRA; and
- (4) The permit conditions incorporated into West Virginia Surface Mining Permits S006983, S007280, S501494, S504592, U503595, O51600, and S505289 by operation of 38 C.S.R. § 2-3.33.c, promulgated under the State Act.

Coal-Mac's SMCRA-related violations began on or about April 5, 2010, when its selenium effluent limitations became final. We believe that Coal-Mac will continue to violate those limits after that date.

1. BACKGROUND

In 1977, Congress enacted SMCRA in order to “assure that surface coal mining operations are so conducted as to protect the environment.” 30 U.S.C. § 1202(d). SMCRA encourages “cooperative federalism” by allowing states to adopt their own programs for the regulation of mining, so long as those programs are as stringent as the federal program. See generally 30 U.S.C. § 1253. The Secretary of the Department of the Interior, charged with implementing SMCRA, has approved West Virginia's state mining regulation program. See 30 C.F.R. § 948.10. Consequently, West Virginia regulates mining operations in this state under article 3 of chapter 22 of the West Virginia Code and issues surface mining permits consistent with that statute.

To serve the statutory goal of environmental protection, SMCRA and the State Act impose performance standards on mining operations. Those standards are codified in 40 C.F.R. Parts 816 and 817, and 38 C.S.R. § 2-14. Coal-Mac's violation of the performance standards will be the basis of any citizen suit under SMCRA.

Under the color of WV/NPDES Permit WV0068764, Coal-Mac discharges unlawful quantities of selenium into Laurel Fork of the Right Fork of Pine Creek, Fivemile Creek, and Right Fork of Trace Fork of Pigeon Creek from its mines near Island Creek in Logan and Mingo Counties, West Virginia.

2. COAL-MAC'S MINING OPERATIONS HAVE RESULTED IN EFFLUENT LIMITATIONS AND WATER QUALITY STANDARDS VIOLATIONS

The federal performance standards under SMCRA mandate that all discharges from permitted mining operations “be made in compliance with all applicable State and Federal water quality laws and regulations and with the effluent limitations for coal mining promulgated by the U.S. Environmental Protection Agency set forth in 40 C.F.R. Part 434.” 40 C.F.R. §§ 816.42 & 817.42. The regulations under the State Act

prescribe a similar standard: “Discharge from areas disturbed by surface mining shall not violate effluent limitations or cause a violation of applicable water quality standards.” 38 C.S.R. § 2-14.5.b.

The DMRs that Coal-Mac provided to WVDEP under the Clean Water Act that document the company’s discharges under WV/NPDES Permit WV0068764 indicate that Coal-Mac likely began violating its effluent limits for selenium when they became final on April 5, 2010. Moreover, as described above, those discharges caused violations of applicable numeric water quality standards. As discussed above, each discharge amount that exceeds permit limits is an unlawful and unpermitted discharge and, therefore, is not shielded from liability under Section 402(k) of the Clean Water Act. Swartz v. Beach, 229 F. Supp. 2d 1239, 1269 (D. Wyo. 2002); U.S. E.P.A. Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits at 2, n.1 (April 11, 1995) (explaining that, in a NPDES permit, “authorization is only provided to discharge such pollutants within the limits and subject to the conditions set forth in the permit” (emphasis added)). Consequently, Coal-Mac is in violation of the federal and state performance standards regarding surface water discharges and is subject to a citizen suit under SMCRA.

3. COAL-MAC IS IN ONGOING AND CONTINUING VIOLATION OF THE CONDITIONS OF WEST VIRGINIA SURFACE MINING PERMITS S006983, S007280, S501494, S504592, U503595, O51600, AND S505289

Under the State Act, all of the performance standards set forth in the West Virginia Surface Mining Rule—including the performance standards discussed above—are incorporated as conditions in every permit issued under the act. 38 C.S.R. § 2-3.33.c. Coal-Mac’s Surface Mining Permits S006983, S007280, S501494, S504592, U503595, O51600, and S505289 are associated with its unlawful discharges under WV/NPDES Permit WV0068764. By operation of 38 C.S.R. § 2-33.c, those surface mining permits incorporate the performance standards discussed in Section II.B supra. The upshot of that incorporation is that Coal-Mac’s unlawful discharges are subject to regulation under the terms of its surface mining permits.

As described above, Coal-Mac is violating the performance standards that prohibit violations of effluent limitations and water quality standards. See 40 C.F.R. §§ 816.41-816.42 & 817.41-817.42, 38 C.S.R. §§ 2-14.5 & 2-14.5.b. Consequently, it is simultaneously violating the conditions of Surface Mining Permits S006983, S007280, S501494, S504592, U503595, O51600, and S505289 and is subject to a citizen suit under SMCRA.

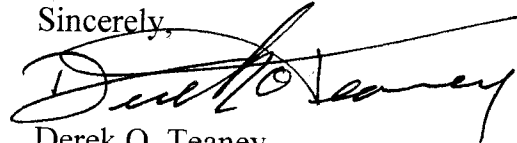
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III. CONCLUSION

As discussed above, if Coal-Mac fails to come into compliance with the Clean Water Act; the terms of WV/NPDES Permits WV1003763 and WV0068764; Amended Order No. 5; SMCRA; surface mining regulations; and the permit conditions of Surface Mining Permits S507492, S006983, S007280, S501494, S504592, U503595, O51600, and S505289, we intend to file a citizen suit under section 505(a)(1) of the Clean Water Act seeking civil penalties and injunctive relief, as well as a citizen suit under section 520(a)(1) of SMCRA seeking a court order compelling Coal-Mac to come into compliance with the law. Be aware that this notice is sufficient to allow us to sue Coal-Mac for any post-December 31, 2009 violations related to the violations described herein. See generally, Public Interest Research Group of N.J., Inc. v. Hercules, Inc., 50 F.3d 1239 (3rd Cir. 1995).

If Coal-Mac has taken any steps to eradicate the underlying cause of the violations identified in the attached appendices, or if Coal-Mac believes that anything in this letter is inaccurate, please let us know. If Coal-Mac does not advise us of any remedial steps during the 60-day period, we will assume that no such steps have been taken and that violations are likely to continue. Additionally, we would be happy to meet with Coal-Mac or its representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,



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**APPENDIX A SUMMARY OF EXCEEDANCES OF THE EFFLUENT LIMITS IN
WV/NPDES PERMIT WV1003763**

OUTFALL 002

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE	DAYS OF VIOLATION
December 2008	Monthly Average	Selenium	µg/l	4.7	9.01	29
December 2008	Daily Maximum	Selenium	µg/l	8.2	8.94	1
December 2008	Daily Maximum	Selenium	µg/l	8.2	9.085	1
January 2009	Monthly Average	Selenium	µg/l	4.7	9.41	31
January 2009	Daily Maximum	Selenium	µg/l	8.2	10.39	1
January 2009	Daily Maximum	Selenium	µg/l	8.2	8.42	1
March 2009	Monthly Average	Selenium	µg/l	4.7	5.53	31
March 2009	Daily Maximum	Selenium	µg/l	8.2	9.16	1
April 2009	Monthly Average	Selenium	µg/l	4.7	11.635	30
April 2009	Daily Maximum	Selenium	µg/l	8.2	12.89	1
April 2009	Daily Maximum	Selenium	µg/l	8.2	10.38	1
May 2009	Monthly Average	Selenium	µg/l	4.7	8.18	31
May 2009	Daily Maximum	Selenium	µg/l	8.2	9.26	1
June 2009	Monthly Average	Selenium	µg/l	4.7	7.985	30
June 2009	Daily Maximum	Selenium	µg/l	8.2	8.54	1
July 2009	Monthly Average	Selenium	µg/l	4.7	5.46	31
August 2009	Monthly Average	Selenium	µg/l	4.7	6.935	31
September 2009	Monthly Average	Selenium	µg/l	4.7	7.13	30
November 2009	Monthly Average	Selenium	µg/l	4.7	6.965	30
December 2009	Monthly Average	Selenium	µg/l	4.7	8.335	31
December 2009	Daily Maximum	Selenium	µg/l	8.2	8.98	1
						345

**APPENDIX B SUMMARY OF EXCEEDANCES OF THE EFFLUENT LIMITS IN
WV/NPDES PERMIT WV0068764**

OUTFALL 001

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE
April 2009	Monthly Average	Selenium	µg/l	4.7	10.81
April 2009	Daily Maximum	Selenium	µg/l	8.2	12.13
April 2009	Monthly Average	Selenium	µg/l	4.7	9.49
May 2009	Daily Maximum	Selenium	µg/l	8.2	7.485
May 2009	Monthly Average	Selenium	µg/l	4.7	8.82
June 2009	Daily Maximum	Selenium	µg/l	8.2	8.47
June 2009	Monthly Average	Selenium	µg/l	4.7	8.58
June 2009	Daily Maximum	Selenium	µg/l	8.2	8.36
July 2009	Monthly Average	Selenium	µg/l	4.7	6.935
August 2009	Daily Maximum	Selenium	µg/l	8.2	6.685
September 2009	Monthly Average	Selenium	µg/l	4.7	7.23
September 2009	Monthly Average	Selenium	µg/l	4.7	8.53
November 2009	Daily Maximum	Selenium	µg/l	8.2	8.145
November 2009	Monthly Average	Selenium	µg/l	4.7	8.78
December 2009	Daily Maximum	Selenium	µg/l	8.2	6.9

OUTFALL 003

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE
October 2008	Monthly Average	Selenium	µg/l	4.7	4.715
November 2008	Monthly Average	Selenium	µg/l	4.7	5.595
December 2008	Monthly Average	Selenium	µg/l	4.7	4.87
November 2009	Monthly Average	Selenium	µg/l	4.7	6.805
November 2009	Daily Maximum	Selenium	µg/l	8.2	8.95
December 2009	Monthly Average	Selenium	µg/l	4.7	6.125

OUTFALL 014

DATE	TYPE	PARAMETER	UNITS	LIMIT	MEASURED VALUE
March 2008	Monthly Average	Selenium	µg/l	4.7	5.175
October 2008	Monthly Average	Selenium	µg/l	4.7	9.85
October 2008	Daily Maximum	Selenium	µg/l	8.2	15.67
November 2008	Monthly Average	Selenium	µg/l	4.7	15.275
November 2008	Daily Maximum	Selenium	µg/l	8.2	16.43
November 2008	Daily Maximum	Selenium	µg/l	8.2	14.12
December 2008	Monthly Average	Selenium	µg/l	4.7	16.545

December 2008	Daily Maximum	Selenium	µg/l	8.2	18.11
December 2008	Daily Maximum	Selenium	µg/l	8.2	14.98
January 2009	Monthly Average	Selenium	µg/l	4.7	13.085
January 2009	Daily Maximum	Selenium	µg/l	8.2	18.01
February 2009	Monthly Average	Selenium	µg/l	4.7	8.115
February 2009	Daily Maximum	Selenium	µg/l	8.2	11.5
March 2009	Monthly Average	Selenium	µg/l	4.7	12.705
March 2009	Daily Maximum	Selenium	µg/l	8.2	16.08
March 2009	Daily Maximum	Selenium	µg/l	8.2	9.33
April 2009	Monthly Average	Selenium	µg/l	4.7	13.76
April 2009	Daily Maximum	Selenium	µg/l	8.2	14.72
April 2009	Daily Maximum	Selenium	µg/l	8.2	12.8
May 2009	Monthly Average	Selenium	µg/l	4.7	15.56
May 2009	Daily Maximum	Selenium	µg/l	8.2	16.88
May 2009	Daily Maximum	Selenium	µg/l	8.2	14.24
June 2009	Monthly Average	Selenium	µg/l	4.7	15.5
June 2009	Daily Maximum	Selenium	µg/l	8.2	17.27
June 2009	Daily Maximum	Selenium	µg/l	8.2	13.73
July 2009	Monthly Average	Selenium	µg/l	4.7	14.47
July 2009	Daily Maximum	Selenium	µg/l	8.2	16.88
July 2009	Daily Maximum	Selenium	µg/l	8.2	12.06
August 2009	Monthly Average	Selenium	µg/l	4.7	14.02
August 2009	Daily Maximum	Selenium	µg/l	8.2	14.38
August 2009	Daily Maximum	Selenium	µg/l	8.2	13.66
September 2009	Monthly Average	Selenium	µg/l	4.7	18.59
September 2009	Daily Maximum	Selenium	µg/l	8.2	20.08
September 2009	Daily Maximum	Selenium	µg/l	8.2	17.1
November 2009	Monthly Average	Selenium	µg/l	4.7	19.84
November 2009	Daily Maximum	Selenium	µg/l	8.2	21.42
November 2009	Daily Maximum	Selenium	µg/l	8.2	18.26
December 2009	Monthly Average	Selenium	µg/l	4.7	19.15
December 2009	Daily Maximum	Selenium	µg/l	8.2	19.15